

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRANDON J. ORR,

Plaintiff,

v.

THE CITY OF RENO, et.al.,

Defendants.

Case No. 3:16-cv-00122-MMD-WGC

ORDER

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 6) ("R&R") relating to Plaintiff's Amended Complaint (ECF No. 5). The Court has reviewed Plaintiff's Objection ("Objection") (ECF No. 7) and Plaintiff's Motion for Appointment of Counsel ("Motion") (ECF No. 8.) The Court accepts and adopts the R&R in its entirety and refers the Motion to the Magistrate Judge for determination.

II. BACKGROUND

Plaintiff, an inmate at Washoe County Detention Center ("WCDC"), is proceeding *pro se* in this action brought pursuant to 42 U.S.C. § 1983. Plaintiff filed an application to proceed *in forma pauperis* and the Court permitted him to proceed on claims under the Fourth Amendment's unlawful search and seizure clause and the Fourteenth Amendment's due process clause. (ECF No. 3 at 10.) The Court gave Plaintiff leave to amend his complaint to amend his equal protection claims as well as his claims against the City of Reno ("the City"). (*Id.*) Plaintiff filed his First Amended Complaint ("FAC") on

1 April 1, 2016. (ECF No. 5.) After review of the FAC, the Magistrate Judge found that
2 Plaintiff had failed to adequately amend his complaint to state facts alleging colorable
3 equal protection claims or colorable claims against the City of Reno. The Magistrate
4 Judge recommends dismissing Plaintiff's equal protection claims with prejudice for
5 Plaintiff's failure to cure the deficiencies identified in the Order granting him leave to
6 amend. The Magistrate Judge further recommends dismissing the claims against the
7 City without prejudice to give Plaintiff the opportunity to seek leave to amend at a later
8 time. In response, the Plaintiff filed an Objection (ECF No. 7), asking that he be
9 appointed counsel as he is "illiterate" and does not understand legal terminology (*id.* at
10 1). Plaintiff filed a Motion (ECF No. 8) in support of his Objection requesting that the
11 Court appoint counsel for him (*id.* at 4). The Court accepts and adopts the R&R in its
12 entirety and refers the Motion to Magistrate Judge Cobb for consideration.

13 **III. LEGAL STANDARD**

14 This Court "may accept, reject, or modify, in whole or in part, the findings or
15 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
16 timely objects to a magistrate judge's report and recommendation, then the court is
17 required to "make a *de novo* determination of those portions of the [report and
18 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of Plaintiffs'
19 objections, the Court has engaged in a *de novo* review to determine whether to adopt
20 Magistrate Judge Cobb's recommendation. Where a party fails to object, however, the
21 court is not required to conduct "any review at all . . . of any issue that is not the subject
22 of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has
23 recognized that a district court is not required to review a magistrate judge's report and
24 recommendation where no objections have been filed. *See United States v. Reyna-*
25 *Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by
26 the district court when reviewing a report and recommendation to which no objections
27 were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003)
28 (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the view that district

1 courts are not required to review “any issue that is not the subject of an objection.”).
2 Thus, if there is no objection to a magistrate judge’s recommendation, then the court
3 may accept the recommendation without review. See, e.g., *Johnstone*, 263 F. Supp. 2d
4 at 1226 (accepting, without review, a magistrate judge’s recommendation to which no
5 objection was filed).

6 **IV. DISCUSSION**

7 **A. Equal Protection Claims**

8 The Fourteenth Amendment prohibits the denial of “the equal protection of the
9 laws.” U.S. Const. amend XIV, § 1. It “commands that no State shall deny to any person
10 within its jurisdiction the equal protection of the laws, which is essentially a direction that
11 all persons similarly situated should be treated alike.” *Lee v. City of Los Angeles*, 250
12 F.3d 668, 686 (9th Cir. 2001) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.
13 432, 439 (1985)). “To state a claim under 42 U.S.C. § 1983 for a violation of the Equal
14 Protection Clause of the Fourteenth Amendment a plaintiff must show that the
15 defendants acted with an intent or purpose to discriminate against the plaintiff based
16 upon membership in a protected class.” *Lee v. City of Los Angeles*, 250 F.3d 668, 686
17 (9th Cir. 2001). Alternatively, an equal protection claim may be brought by a “class of
18 one,” where a plaintiff alleges he has been intentionally treated differently from others
19 similarly situated. *Village of Willowbrook v. Olech*, 528 U.S. 562, 563.

20 In Count I of the FAC, Plaintiff asserts in part a violation of his rights under the
21 equal protection clause. (ECF No. 5 at 3-4.) Pertinent to the equal protection analysis,
22 Plaintiff alleges that two Reno police officers previously harassed, intimidated, and lied to
23 Plaintiff on the basis that Plaintiff, because of his race, was a gang member. (*Id.*) In the
24 initial complaint, the Magistrate Judge found that Plaintiff failed to state a factual
25 scenario that implicated the equal protection clause but that Plaintiff should be given an
26 opportunity to amend. (ECF No. 3 at 6.) However, the factual allegations of Count I in the
27 FAC are insufficient to show that the officers acted with an intent or purpose to
28 discriminate against Plaintiff because of his membership in a protected class, which is

1 required to state a colorable claim under the equal protection clause. The Court
2 therefore concurs in the Magistrate Judge's recommendation that Plaintiff's equal
3 protection claim under Count I be dismissed with prejudice.

4 In Count II of the FAC, Plaintiff alleges that upon his arrest, defendant police
5 officers "stole" Plaintiff's personal property out of his girlfriend's apartment, taking a
6 variety of items without due process of law. (ECF No. 5 at 5.) The Magistrate Judge gave
7 Plaintiff an opportunity to include additional facts in the FAC in order to state a colorable
8 claim under the equal protection clause, but Plaintiff failed to do so. (ECF No. 3 at 8, 6 at
9 6.) The Court therefor concurs with the recommendation that the equal protection claim
10 under Count II be dismissed with prejudice.

11 In Count III of the Complaint, Plaintiff alleges that defendant police officers placed
12 "hyperbolic" needles, shot gun shells, and weapons in his girlfriend's apartment to make
13 the house appear like a drug house. (ECF No. 5 at 6.) He also claims that defendant
14 police officers damaged his girlfriend's apartment by tearing up rooms, kicking holes in
15 doors, emptying trash on the floors, breaking racks, turning on the upstairs bathroom to
16 flood the residence, and dumping cat litter around the apartment. (*Id.*) The Magistrate
17 Judge gave Plaintiff an opportunity to amend Count III to provide additional factual
18 allegations to state a colorable claim under the equal protection clause. (ECF No. 3 at 9.)
19 In the FAC, Plaintiff adds allegations that the City of Reno is responsible for training their
20 officers to racially profile individuals. (ECF No. 5 at 6-7.) However, this additional factual
21 allegation is insufficient to state a colorable claim under the equal protection clause.
22 Thus, the Court concurs with the recommendation to dismiss the equal protection claim
23 in Count III with prejudice.

24 **B. Claims Against the City of Reno**

25 In his Order, Magistrate Judge Cobb advised Plaintiff that in order to maintain a
26 claim against the City of Reno, he needed to allege that there was a municipal policy or
27 custom that caused Plaintiff's injuries. (ECF No. 3 at 9.) In his FAC, Plaintiff included two
28 attempts to meet the Magistrate Judge's instruction by stating that the City of Reno is

1 responsible for not training its officers properly and for training its officers to racially
2 profile individuals. (ECF No. 5 at 4, 7.) This conclusory allegation alone, however, is
3 insufficient to show that the City had a policy or custom that caused Plaintiff's injuries.
4 The Magistrate Judge recommends dismissing Plaintiff's claims without prejudice to give
5 Plaintiff the opportunity to seek leave to amend to allege facts showing that the City's
6 conduct amounted to deliberate indifference. (ECF No. 6 at 8.) The Court accepts this
7 recommendation, dismissing Plaintiff's claims against the City of Reno without prejudice
8 and with leave to file a motion to amend in order to assert these claims against the City
9 by the deadline to amend.

10 **C. Motion for Appointment of Counsel**

11 Generally, there is no constitutional right to counsel in a civil case. *See Lassiter v.*
12 *Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981). However, a court may request counsel
13 to represent indigent civil litigants in exceptional circumstances. *Terrell v. Brewer*, 935
14 F.2d 1015, 1017 (9th Cir. 1991); 28 U.S.C. § 1915(e)(1). "A finding of exceptional
15 circumstances requires an evaluation of both the likelihood of success on the merits and
16 the petitioner's ability to articulate his claims *pro se* in light of the complexity of the legal
17 issues that are involved." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)
18 (citing *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) (quotations omitted)). The
19 Court must view these two factors together and not distinctly before reaching a decision.
20 *Id.*

21 In his Objection, Plaintiff states that he is illiterate. (ECF No. 7 at 1.) On further
22 inspection, the Court notes that Plaintiff's Objection, Motion, and Notice of Updated
23 Address (ECF No. 9) all appear to be written by the same person. The Court is
24 concerned that Plaintiff is in fact unable to write his own filings and is utilizing the aid of
25 another individual to write and file these documents. For that reason, the Court refers
26 Plaintiff's Motion to the Magistrate Judge to determine if Plaintiff's circumstances meet
27 the "exceptional circumstances" test such that Plaintiff requires the aid of counsel to
28 proceed on his claims.

V. CONCLUSION

It is therefore ordered, adjudged and decreed that the Report and Recommendation of Magistrate Judge William G. Cobb (ECF No. 6) is accepted and adopted in full. The following claims may proceed:

- (a) The Fourth Amendment unlawful detention and arrest claim against Vogt, Caprioli, Schaur, and Atkinson in Count I;
- (b) The due process claim against Vogt, Caprioli, Schaur, Carter, Wilson and Atkinson in Count II;
- (c) The Fourth Amendment claim for unlawful search and seizure against Vogt, Caprioli, Schaur, Carter Wilson and Atkinson in Count II;
- (d) The Fourth Amendment claim and due process claims against Carter in Count III related to the allegation that Carter took \$100 from the residence;
- (e) The Fourth Amendment claim against Wilson, Schaur, Caprioli, Atkinson and Carter in Count III related to the allegations that they inflicted damage to the residence during the search; and
- (f) The due process claim against Wilson, Schaur, Caprioli, Atkinson and Carter in Count III related to the alleged falsification of evidence in the residence.

The equal protection claims in Counts I-III are dismissed with prejudice. The City of Reno is dismissed without prejudice, and Plaintiff may file a motion for leave to amend within the deadlines of the scheduling order once it is issue if he believes he can allege sufficient facts to state claims against the City.

The Clerk is directed to send Plaintiff sufficient copies of the Amended Complaint and service of process forms (USM-285) for each defendant. Plaintiff will be given twenty (20) days in which to furnish the U.S. Marshal with the required form USM-285 for each defendant. The U.S. Marshal will then proceed with service of the summons and Amended Complaint on each defendant. Within twenty (20) days after receiving from the U.S. Marshal a copy of the USM-285 form showing whether service has been accomplished, Plaintiff must file a notice with the Court identifying which defendants

1 were served and which were not served, if any. If Plaintiff wishes to have service again
2 attempted on any unserved defendant, then a motion must be filed with the Court
3 identifying the unserved defendant(s) and specifying a more detailed name and/or
4 address for said defendant, or whether some other manner of service should be
5 attempted. Plaintiff is reminded that pursuant to Rule 4(m) of the Federal Rules of Civil
6 Procedure, service must be accomplished within ninety (90) days of the date of any order
7 adopting and accepting this Report and Recommendation.

8 Plaintiff is advised that from now on, he must serve upon defendants or, if
9 appearance has been entered by counsel, upon the attorney(s), a copy of every
10 pleading, motion or other document submitted for consideration by the court. Plaintiff
11 must include with the original paper to be filed with the Court a certificate stating the date
12 that a true and correct copy of the document was mailed to the defendants or counsel for
13 defendants. The Court may disregard any paper received by a District Judge or a
14 Magistrate Judge which has not been filed with the Clerk, and any paper received by a
15 District Judge, Magistrate Judge or Clerk which fails to include a certificate of service.

16 It is further ordered that Plaintiff's Motion for Appointment of Counsel (ECF No. 8)
17 is referred to Magistrate Judge Cobb for determination.

18 DATED THIS 8th day of November 2016.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE